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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS F. SMITH, JR., *et al.*,
Petitioners,

v.

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES AMICUS CURIAE

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QUESTION PRESENTED BY *AMICUS*

Can plaintiffs, who allege a substantial Rehabilitation Act claim in addition to substantial constitutional claims, none of which is addressed in view of plaintiffs' total success on a nonfee statutory claim, be denied an award of attorney's fees under the Rehabilitation Act, 29 U.S.C. § 794a(b), contrary to the express intent of Congress?

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BRIEF OF THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES AMICUS CURIAE

INTEREST OF THE *AMICUS*

*Amicus,** the Association for Children and Adults with Learning Disabilities, ("ACLD"), is a volunteer association with over 60,000 members in 800 chapters in the fifty states and the District of Columbia. The membership is composed of learning disabled individuals, par-

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* Pursuant to Rule 36.2 of the Rules of this Court, letters of consent from the parties have been filed with this brief.

ents of the learning disabled, and professionals from fields such as education and psychology who work with learning disabled people. According to the United States Department of Education, learning disabled students comprise the largest group of handicapped children in the United States. ACLD's paramount purpose is promoting the education and welfare of those with learning disabilities.

ACLD has long been vigilant in protecting the rights of those with learning disabilities. ACLD initiated and was the prime mover in the successful effort to amend the Elementary and Secondary Education Act ("ESEA") to include learning disabilities. Since the amendment of ESEA in 1970, ACLD has worked closely with the Bureau of Education for the Handicapped (subsequently the Office of Special Education and now, Special Education Programs) of the Department of Health, Education and Welfare (now Department of Education) in an effort to increase the quality and quantity of educational and vocational rehabilitation programs provided to all handicapped people, not only the learning disabled.

ACLD and its members worked strenuously for the passage of Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975. ACLD views the Rehabilitation Act as the cornerstone of the nation's commitment to erradicate discrimination on the basis of handicap. ACLD fought vigorously for the passage of the Rehabilitation Act and the Education for All Handicapped Children Act to "open the door" to public education for millions of handicapped children.

Amicus views Section 505 of the Rehabilitation Act as the latest and most important Congressional enactment devised to protect the rights of the handicapped. This section, providing for attorney's fees for those who prevail in a challenge to discrimination on the basis of handicap, enables many of the formerly powerless to success-

fully assert their rights and to vindicate the national policy of equality for the handicapped.

Although *Amicus* completely agrees with the petitioners' position concerning the availability of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, *Amicus* also recognizes that the interpretation of Section 505 in this case may significantly determine the scope of enforcement of the civil rights of handicapped persons. ACLD believes that only an interpretation of Section 505 consistent with the congressional intent to allow fees for *all* of those who successfully challenge discrimination will afford private individuals the protection they require and will help the nation reach its goal of ending discrimination.

SUMMARY OF ARGUMENT

Section 504 is the first federal statutory guarantee of protection against discrimination based on handicap. It enables qualified individuals to enforce their right to participate in the mainstream of American society and establishes that "mere possession of a handicap is not a permissible ground for assuming an inability to function."

Section 504 has particular significance for handicapped children, ensuring the provision of an appropriate education and related services in any federally-funded program. Since Section 504 mandates that handicapped children have the opportunity to *benefit* from educational programs for which they qualify, public school systems have the responsibility to make special education programs *meaningful* for those children. This mandate has been embodied in regulations of the United States Department of Education which subsequently have been approved by Congress.

Section 504 complements and reinforces the Education for All Handicapped Children Act of 1975. Although

clearly related and aligned in their purposes, the two statutes are independent. Among other differences, they contain separate definitions of "handicapped individuals," program requirements, and target populations. Congress intended that these two statutes form the foundation of a national commitment to erradicate discrimination on the basis of handicap.

Section 504 was amended in 1978 to provide for an award of attorney's fees to those handicapped individuals who successfully litigate their right to be free from discrimination. In passing this fees provision, Congress expressly sought to correct the omission of disabled people from those groups entitled to receive fees for vindicating their rights. This new section—Section 505—explicitly applies to handicapped children who must seek the courts' intervention to protect their right to an appropriate education.

A major reason for the passage of Section 505 was Congress' recognition that the availability of attorney's fees is often the difference as to whether handicapped children will be able to assert their right to special education. Since Section 504, along with other civil rights laws, depends heavily upon private enforcement, Congress did not exclude from fee awards under Section 505 cases that also involve claims under the Education for All Handicapped Children Act.

Congress also intended that the provision of fees would encourage the administrative process established by Section 504 and the Education for All Handicapped Children Act to function equitably and efficiently. Section 505 expresses the intent of Congress to *aid* all handicapped children seeking an appropriate education.

I. SECTION 504 PROTECTS HANDICAPPED CHILDREN'S RIGHT TO NONDISCRIMINATION IN EDUCATION.

A. Under Section 504 There Is a Private Right of Action to Remedy Discrimination on the Basis of Handicap.

The Rehabilitation Act of 1973, *as amended*,[1] is the first federal statutory guarantee of protection against discrimination based upon handicap. It is from this statute, which embodies a national commitment to bring disabled persons into the "mainstream" of American society, that Tommy Smith's right to an appropriate education flows. It is also as a result of this national commitment that Tommy and his parents were able to enforce that right.

After this Court's decisions in *Guardians Association v. Civil Service Commission of the City of New York*, 103 S.Ct. 3221 (1983), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979), holding that private rights of action exist under Title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d-2000d-6] and Title IX of the Education Amendments of 1972 [20 U.S.C. § 1681],[2] there

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[1] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1980) ("Section 504"), provides in pertinent part: "No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 505, 29 U.S.C. § 794a (Supp. V 1980), is the accompanying attorney's fees provision.

[2] "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 [Title VI] of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 . . . and section 901 of the Education Amendments of 1972, [Title IX] 20 U.S.C. 1683 . . . This section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap . . . This approach to implementation of Section 504, which closely follows the models of the above-cited antidiscrimination provisions,

can be no doubt as to the availability of a private right of action to enforce Section 504, *as amended*, 29 U.S.C. § 794.[3]

It is equally clear that this private right of action under Section 504 of the Rehabilitation Act of 1973, *as amended*, (hereinafter cited as "Section 504"), applies to cases involving claims of discrimination on the basis of handicap in the provision of educational services to handicapped students:

> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services or any other Federally-aided programs. *Examples of handicapped individuals who may suffer discrimination in the receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability in section 7 (6) are as follows: physically or mentally handicapped children who may be denied admission to Federally supported school systems on the basis of their handicap.*

H.R. Rep. No. 1457, 93d Cong., 2d Sess. 25 (1974) (emphasis added). *See New Mexico Association for Retarded*

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would ensure administrative due process . . . provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*" H.R. Rep. No. 1457, 93d Cong., 2d Sess. 27 (1974) (emphasis added).

[3] Initially, the question of a private right of action to enforce Section 504 was before the Court in *Consolidated Rail Corp. v. Darrone ("Lestrange")*, No. 82-862, Brief for Petitioner, 30-48, but it would appear that, based upon the authorities set out above, all involved in *Lestrange* agree that there is no longer any doubt concerning the existence of a private right of action under Section 504. Brief for Respondent, 5-16, Brief for the United States as *amicus curiae*, 5-10, and Reply Brief for Petitioner, 2-3.

Citizens v. New Mexico (hereinafter cited as "*NMARC v. New Mexico*"), 678 F.2d 847, 855 (10th Cir. 1982) ("Section 504's prohibition against discrimination represents a step toward attainment of equality in education for the handicapped."); *Doe v. Marshall*, 459 F. Supp. 1190, 1191 (S.D. Tex. 1978), *vacated as moot*, 622 F.2d 118 (5th Cir. 1980) ("A review of the legislative history and the cases which illuminate § 794 reveal that this congressional enactment, for practical purposes, places upon school districts and agencies which receive federal funds, such as the defendants, the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education.")[4]

B. Section 504 Requires That Handicapped Children Be Provided an Appropriate Education.

By its terms, Section 504 prohibits more than the mere exclusion of students on the basis of handicap from federally-funded education programs. The statute also forbids any denial of benefits of, or discrimination in, such programs on the basis of handicap. Based upon this Court's holding delineating the scope of Title VI in *Lau v. Nichols*, 414 U.S. 563, 566 (1974),[5] the Tenth Circuit has held: "Students who are handicapped, often by speech or hearing impairments or other learning disabilities, are similarly foreclosed from any meaningful education."

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[4] *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S.Ct. 230 (1982); *New York State Ass'n for Retarded Citizens v. Carey*, 612 F.2d 644 (2d Cir. 1979); *David H. v. Spring Branch Indep. School Dist.*, 569 F. Supp. 1324 (S.D. Tex. 1983); *Howard S. v. Friendswood Indep. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976).

[5] "There is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

NMARC v. New Mexico, 678 F.2d at 854. Other courts that have considered the question uniformly have found that Section 504 ensures an appropriate education to handicapped children:

> It is clear that Section 504 prohibits a handicapped individual from being denied the benefits of an educational program which receives federal financial assistance. This language shows that the congressional intent was not merely to prohibit the denial of access to such programs, but also to give handicapped persons an opportunity to enjoy the benefits of, and have access to, such programs. It indicates that special treatment or additional services may be necessary for the handicapped person to fully enjoy the benefits of his education. *Mere access to conventional education may not be sufficient. If Congress had intended only to prohibit the denial of access to federally funded educational programs, it could easily have done so.*

Georgia Association for Retarded Citizens v. McDaniel (hereinafter cited as *"GARC v. McDaniel"*), 511 F. Supp. 1263, 1280 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983) (emphasis added).[6]

Moreover, those charged with administering Section 504 have recognized its mandate for appropriate special education. The regulations promulgated pursuant to Section 504, 34 C.F.R. §§ 104.01-104.10 and 34 C.F.R. §§ 104.31-104.39 (1982),[7] clearly delineate this guaran-

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[6] "The statute, then, does not merely prohibit the denial of access to federally funded programs but also gives handicapped persons an equal opportunity to enjoy the benefits of such programs. It indicates that special treatment or additional services may be necessary for the handicapped person to fully enjoy the benefits of his education, and mere access to conventional education may not be sufficient." *David H. v. Spring Branch Indep. School Dist.*, 569 F. Supp. at 1333.

[7] The regulations were originally promulgated by the Department of Health, Education and Welfare. Pursuant to § 601 of P.L. 96-88,

tee of appropriate education to handicapped students. Of course, in order for Section 504's protections to apply, the handicapped person must be able to achieve benefit from the appropriate provision of educational services as this Court has instructed in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), but no issue has been raised as to Tommy Smith's being "otherwise qualified" to benefit from an appropriate educational program and placement. The Rhode Island legislature has recognized that Tommy Smith and other handicapped children can benefit from an appropriate educational program. R.I. Gen. Laws § 16-24-1 (1981) and R.I. Const. art. 13, § 1. As the record indicates, Tommy progressed in the program at Bradley Hospital and was able to move to a less restrictive placement at the Harmony Hill School. J. App. at 127. *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981); *Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983).[8]

As has been noted, "The teeth of § 504 are provided by its extensive regulations." Stafford, *Education For The Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 80 (1978).[9] In *Southeastern* this Court recognized

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the Department of Education Organization Act, 20 U.S.C. § 3401 (1981), the authority was transferred to the Department of Education on May 4, 1980. Executive Order No. 12212, 45 Fed. Reg. 29,557 (1980). Both agencies will be referred to as the "Department."

[8] "But ever since [*PARC*] and [*Mills*], it has never been considered that handicapped children were 'unqualified' to receive an appropriate public education. Those cases were decided before the enactment of section 504. Moreover, the Education for Handicapped Act made it clear that Congress recognized that, far from being 'unqualified' for a public education, a handicapped child had a right to an appropriate public education. Thus, extensive modifications which might be 'substantial' in other contexts may be reasonable efforts to educate handicapped children." *Jose P. v. Ambach*, 557 F. Supp. at 1235.

[9] While this is obviously not contemporaneous legislative history, Senator Stafford was a prime sponsor of Sections 504, 505, and the EHA, *Patsel v. District of Columbia Bd. of Educ.*, 530 F. Supp. 660, 666 n. 7 (D.D.C. 1982), and as this Court has held, "[I]t is the

the vital role that the Department has in the enforcement scheme of § 504, "[I]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." *Southeastern Community College v. Davis*, 442 U.S. at 413.

In drafting the implementing regulations, the Department recognized that Section 504's prohibition against discrimination requires that public school systems provide an appropriate education as well as the related services handicapped children require.[10] This recognition

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sponsors that we look to when the meaning of the statutory words is in doubt," *Woodwork Manufacturers' Ass'n v. NLRB*, 386 U.S. 612, 640 (1967), and "[A] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1975).

[10] The Department found that Section 504 mandated: "(1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children . . . a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense."

"These regulations conform to the standards established for the education of handicapped persons in *Mills . . ., Pennsylvania Association For Retarded Children v. Commonwealth of Pennsylvania, . . . Lebanks v. Spears, . . .* as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (EHA)." 34 C.F.R. § 104 —Appendix A—Analysis of Final Regulations at 358-359 (1982). *PARC* held that the failure to provide education to mentally retarded children violated their rights to equal protection. *Mills* expanded this holding to cover all disabled children, resting on due process as well.

conformed with the established case law which held that failure of the public agencies to provide an appropriate education to children such as Tommy Smith violated the constitutional guarantees of equal protection and due process. *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972 and *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (1971), 343 F. Supp. 279 (E.D. Pa. 1972) (three judge court) (hereinafter cited as "*PARC*").

The Section 504 regulations were adopted in June of 1977, a year before Congress re-examined the Rehabilitation Act and added Section 505. *Patsel v. District of Columbia Board of Education*, 530 F. Supp. 660, 663 (D.D.C. 1982) (hereinafter cited as "*Patsel v. D.C. Bd. of Educ.*"). In passing Section 505, "the Senate report specifically noted the existence of the HEW regulations. . . . Moreover, the report noted that Section 505 did nothing more than codify the rights, remedies, and procedures found in the HEW regulations." *Jones v. Metropolitan Atlanta Transit Authority*, 681 F.2d 1376, 1382 (11th Cir. 1982) (hereinafter cited as *Jones v. MARTA*") (citing S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978)).[11]

As this Court has instructed:

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[11] Although this language could be interpreted as applying solely to subsection (a) of Section 505, its inclusion in the Report evidences Congress' detailed review and approval of the HEW regulations. The presumption that the regulators were following, "a consistent administrative construction of [the] statute," *Haig v. Agee*, 453 U.S. 280, 291 (1981), certainly applies here. Congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy. *Id.* at 300, *Zemel v. Rusk*, 381 U.S. 1, 11 (1965). However, as discussed in the text, in the case of the Section 504 regulations, "the inference of congressional approval" is supported by more than mere congressional inaction. *Haig v. Agee*, 453 U.S. at 300. In any event, it must be presumed that the legislators carefully considered the regulations before approving Section 505.

> 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . So, too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.' *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1981).

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 (1982) (citations omitted).

In sum, both the language of Section 504 and its judicial and regulatory interpretations make clear that the statute ensures an appropriate education for handicapped students.

II. SECTION 504 AND THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT ARE INDEPENDENT AND COMPLEMENTARY STATUTES THAT REINFORCE AND RECIPROCATE EACH OTHER.

The Court of Appeals held, without citation to any authority, that "the EAHCA's [Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1461] comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act." *Smith v. Cumberland School Committee*, 703 F.2d 4, 10 (1st Cir. 1983).[12] This

[12] This holding appears to contradict the Court's language that, "the more specific rights created by the EAHCA may not indicate a congressional intent to preclude 'overlapping' actions under section 504." *Smith v. Cumberland School Comm.*, 703 F.2d at 9-10. If this language is intended by the Court as a recognition of a cause of action under Section 504, no explanation is suggested as to how a party can proceed under that section without being able to resort to Section 505. In view of the lack of citation for this holding, the apparent disregard for the plain meaning of the statute, *Howe v. Smith*, 452 U.S. 473 (1981), *North Dakota v. United States*, 103 S.Ct. 1095 (1983), and the erroneous conclusion that the existence

holding completely misinterprets the intent of Congress in passing those statutes.

There is clear evidence that both Houses saw the EAHCA as complementing and supplementing the Rehabilitation Act, not replacing it. In passing the EAHCA, the Senate emphasized:

> In earlier legislation adopted by this Committee and enacted into law, strong positive action was taken to prohibit discrimination on the basis of handicapping conditions in all programs receiving Federal funds. Regulations implementing this program (section 504 of the Rehabilitation Act of 1973) are in draft form at this time. The Committee takes further steps in this legislation to provide that positive action be taken.

S. Rep. No. 168, 94th Cong., 1st Sess. 28 (1975), and *see also* 37-38. The House was equally clear:

> [I]t may be noted that the 93rd Congress, and more specifically, this Committee, have already expressed their concern about increased individualization [in education] in at least two public laws: Public Law 93-112, the Rehabilitation Act Amendments of 1973, and Public Law 93-380, the Education Amendments of 1974 (Title I).

H.R. Rep. No. 332, 94th Cong., 1st Sess. 14 (1975).

This situation is virtually identical to those examined by this Court in *Johnson v. Railway Express Agency*, 421

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of a private right of action under Section 504 was in doubt, it seems clear that the Court of Appeals did not give the Section 505 issue due consideration. In addition, the Ninth Circuit, relying in part on the First Circuit's opinion in *Smith*, recently "conclude[d] that Congress foreclosed persons complaining of conduct protected by the EAHCA from asserting claims under the Rehabilitation Act." *Depart. of Educ. v. Katherine D.*, No. 82-4096, slip op. at 19 (Nov. 7, 1983). Given the absence of any legislative history cited by the Ninth Circuit to support that position and the legislative history cited here to oppose it, that view is of questionable validity.

U.S. 454 (1975) and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In those cases the legislative histories of the statutes at issue were held to demonstrate congressional intent to provide complementary remedies.[13] As the legislative history of the EAHCA (and Section 504) similarly indicates, these two statutes, "although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 461.

This case is clearly distinguishable from *Brown v. GSA*, 425 U.S. 820 (1976). As the above language demonstrates, Congress envisioned the EAHCA as part and parcel of a scheme to eradicate discrimination against the handicapped. This Court in *Brown* did not set out a "bright line" test against which congressional intent to preempt existing remedies by subsequent enactments should be measured; rather, as in *Jones* and *Johnson*, the legislative history was found to be determinative. *Brown v. GSA*, 425 U.S. at 828. It is highly significant that the Senate committee considering the EAHCA did not "limit the right of individuals to seek redress of grievances through other avenues such as bringing civil action in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." S. Rep. No. 168, 94th Cong., 1st Sess. 26 (1975).

In addition, there are major differences in the areas covered by the two laws. The EAHCA applies only to states that elect to participate in its funding and reporting mechanisms, 20 U.S.C. § 1412 (1981); Section 504 applies to all states and programs that receive *any* federal funds. *NMARC v. New Mexico*, 678 F.2d at 852. The EAHCA has a narrower definition of a handicapped child, 20 U.S.C. § 1401 (1) (1981), than the Rehabilita-

[13] In *Jones*, this Court held that unless specifically stated in the statute, it "cannot [be] assumed that Congress intended to effect any change, either substantive or procedural, in the prior statute." *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 416 n. 20.

tion Act. 29 U.S.C. § 706(7) (Supp. V 1980). The EAHCA has limited applicability to children under six and over sixteen, 20 U.S.C. § 1412(2)(B) (1981); Section 504 affords protection for all children. 34 C.F.R. § 104.32 (1982). Section 504 mandates program accessibility, 34 C.F.R. § 104.22(b) (1982); the EAHCA does not speak to this issue.

On the other hand, the EAHCA has specific requirements for maintaining confidential records on individual children, 20 U.S.C. §§ 1412(2)(D), 1417(c) (1981); Section 504 is silent in that area. The EAHCA requires, in most instances, exhaustion of administrative remedies before initiating suit. 20 U.S.C. § 1415(e)(3) (1981). Section 504 has been held not to require exhaustion of individual administrative remedies before commencing a civil action. *Fells v. Brooks*, 522 F. Supp. 30 (D.D.C. 1981). *See also, Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1369 (W.D. Mich. 1983) ("I find that there is no exhaustion requirement as a precondition under the Act [Section 504]. There is no such requirement in the Act itself, no legislative history has been presented to support such a view, and the regulations under the Act are directed towards the procedures by which public agencies, not private individuals, may enforce the Act. The remedies available under the administrative procedure promulgated under the Act do not offer the private person compensation in any form for violation of the Act. The only administrative remedy is to terminate the federal funding.")

The EAHCA explicitly requires that a child's educational placement be maintained during the pendency of individual appeals under the statute. 20 U.S.C. § 1415(e)(3) (1981). Section 504 has no such explicit requirement, but has been employed when the EAHCA provides no jurisdictional basis for a suit to enforce the right to remain in *status quo* prior to the the completion of the administrative process. *Hymes v. Harnett County Board*

of Education, 664 F.2d 410 (4th Cir. 1982). *See also, Hastings v. Maine-Endwell Central School District*, 676 F.2d 893, 894-895 (2d Cir. 1982) (School system's attempt to immediately review student's placement after student had prevailed at an administrative hearing held to violate student's due process rights although permitted by the EAHCA.)

The Section 504 regulations, adopted while the EAHCA regulations were being promulgated, "do not defer to the EHA procedures, but merely refer to them in creating separate rights which may be independently or concurrently vindicated." *Patsel v. D.C. Bd. of Educ.*, 530 F. Supp. at 666. As this Court has held on numerous occasions,[14] such a determination by those charged with administering these acts—in this case, that the two statutes complement and reinforce one another—is entitled to great deference.

"[T]he EHA is closely aligned with Section 504, both in language and in purpose." *David H. v. Spring Branch Independent School District*, 569 F. Supp. at 1335 (S.D. Tex. 1983), *and see, S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981). As Senator Stafford, one of the drafters of the EAHCA, observed:

> The two laws and their regulations reinforce and reciprocate each other. No educational jurisdiction which receives federal funds and wishes to continue to receive them can escape their provisions.

Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 82 (1980),[15] *see supra* note 11.

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[14] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

[15] Other commentators have also noted the close relationship between the EAHCA and Section 504. *See, e.g.*, National Association of State Directors of Special Education and National Association of State Boards of Education, *Answering Your Questions About P.L. 94-142 and Section 504*, 6 (1979) ("Questions about the Relation-

Finally, if Congress had intended for the EAHCA to limit, or affect in any way, the rights created under Section 504, it certainly could have said so. Section 504 was enacted pursuant to the Equal Protection Clause, U.S. Const. amend. xiv, § 5, *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), and, as has been noted above, applies to all recipients of federal funds. The EAHCA, on the other hand, was passed partially pursuant to Congress' spending power, *Board of Education v. Rowley*, 458 U.S. 176, 204 (1982) (hereinafter cited as "*Bd. of Educ. v. Rowley*"), a more limited grant of authority than the Equal Protection Clause, and affords rights *only* to children in states that elect to participate in its provisions. Since the EAHCA was enacted only one year after Section 504 was specifi-

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ship Between P.L. 94-142 and Section 504"); United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 53 (1983) ("Another area of active litigation has been the application of Section 504 to elementary and secondary education."); Weinstein, *Education of Exceptional Children*, 12 Creighton L. Rev. 987, 1027 (1979) ("The significance of . . . the Rehabilitation Act is . . . the requirements of specially tailored programs, nondiscriminatory evaluation and placement, and due process."). In particular, commentators and the courts have discussed these relationships in areas such as minimum competency, *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983), A. Rosewater, *Minimum Competency Testing Programs and Handicapped Students: Perspectives on Policy and Practice* 5 (1979) ("One set of criteria for determining the appropriateness of minimum competency programs for use with handicapped students may be drawn from . . . P.L. 94-142 and Section 504."); discipline, *S-1 v. Turlington*, 635 F.2d 342, and Note, *The Rights of Handicapped Students in Disciplinary Proceedings by Public School Authorities*, 51 Colo. L. Rev. 367 (1981); and non-discriminatory assessments, *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), and K. Heller, K. Holtzman, and S. Messick, *Placing Children in Special Education: A Strategy for Equity* 3 (1982) ("Both Section 504 . . . and the Education for All Handicapped Children Act . . . require the formal identification of children with handicapping conditions.").

cally made applicable to educational services, Congress clearly would have spelled out any limiting effect it intended for Section 504. If the EAHCA were meant to preempt Section 504 rights and remedies, the result would be both illogical and inequitable—handicapped children in states participating in the EAHCA would forfeit specific rights conferred by the Equal Protection Clause. U.S. Const. amend. xiv, § 5. If this were the case, handicapped children in New Mexico, a state which elects not to participate in the EAHCA, would have no right to receive an appropriate education. Yet that is not the case. *NMARC v. New Mexico*, 678 F.2d at 855 (10th Cir. 1982).

The EAHCA was *not* enacted to limit Section 504, but to complement it. As Senator Randolph observed:

> We can look back over the past few years and see that progress has been made in meeting our responsibility to these handicapped children; however, we should not complacently assume that enough has been done for these children to assure their right to a free appropriate public education.[16]

121 Cong. Rec. 19,482 (1975). It is clear that the First Circuit's holding that the EAHCA limits the rights af-

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[16] In two recent decisions, this Court has apparently concurred with the view that Section 504 and the EAHCA reinforce each other. In *Pennhurst State School v. Halderman*, 451 U.S. 1, 31 (1981), the Court refers to the EAHCA and Section 504 to support the statement, "Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded." Last year, in *Bd. of Educ. v. Rowley*, 458 U.S. at 179, the Court described the EAHCA as a funding statute that, "provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures." The Court emphasized that the EAHCA was one of a series of legislative efforts by Congress since 1966 to provide educational opportunities for the handicapped. *Id.*

forded by the Rehabilitation Act is contrary to the language of the statutes and the intent of Congress.

III. SECTION 505 PROVIDES FOR FEES TO PREVAILING PARTIES IN AN ACTION TO COMPEL THE PROVISION OF A FREE APPROPRIATE EDUCATION.

A prevailing party under Section 504 is entitled to attorney's fees which are provided for in Section 505(b), 29 U.S.C. § 794a(b) (Supp. V 1980):

> In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the cost.

The Court of Appeals did not suggest that petitioners failed to raise a substantial claim under Section 504. *Maher v. Gagne*, 448 U.S. 122 (1980). Since the intent of Congress was to interpret Section 505 consistently with Section 1988, 124 Cong. Rec. 30,364-7 (1978) (Remarks of Senator Cranston), in order to prevail under Section 505, it is only necessary to raise a substantial Section 504 claim and to achieve some of the benefits sought through the litigation. *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983). As this Court has recognized, it is not necessary that there be an actual ruling or determination on the Section 504 claim, "as long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'" *Maher v. Gagne*, 448 U.S. at 132 (1980). *See also*, H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4, n.7 (1976).

Respondents' refusal to fund Tommy's special education placement would have totally excluded him from any and all federally-funded education solely on the basis of his status as a qualified handicapped individual. If Tommy had not been handicapped, or had a different handicap, he would have been allowed to participate in

and gain the benefits of an educational program.[17] However, since he was compelled to file suit in order to gain those rights, he clearly was a "prevailing party."

As the court in *Patsel* held, Section 505, "was enacted to benefit *all* handicapped individuals." 530 F. Supp. at 666. (emphasis added). Obviously, Section 505 could have been limited to cases that could *only* have been brought under the Rehabilitation Act if that had been the intent of Congress, "since both the EHA and Section 504 were already in existence, as were their coordinated and consistent regulations. It was not limited, however." *Id.*

The First Circuit, however, held that Section 505 did not apply because, as noted in the previous section, the relief that was obtained *could* have been afforded under the EAHCA,[18] and that, "the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that

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[17] In this case, there was discrimination between *different classes* of handicapped children. As the Rhode Island Supreme Court held, *Smith v. Cumberland School Committee*, —— R.I. ——, 415 A.2d 168, 173 (1980), that State's scheme for the provision of special education mandates respondents' responsibility for the provision of a free, appropriate special education to children with other handicapping conditions *without* allowing for the dilatory and misplaced attempt to shift responsibility to the Department of Mental Health, Retardation and Hospitals. For example, the State procedures for placing learning disabled children would not have required that the procedure herein be followed. Consequently, that type of handicapped child would not have been in danger of exclusion since there would have been no dispute over respondents' responsibility. *See, e.g., Turillo v. Tyson*, 535 F. Supp. 577 (D.R.I. 1982), and *Colin K. v. Schmidt*, 536 F. Supp. 1375 (D.R.I. 1982), *aff'd*, 715 F.2d 1 (1st Cir. 1983).

[18] No EAHCA adjudication was ever made below. As the First Circuit held in its unpublished decision on the appeal of the *merits* determination by the District Court, "the plaintiff has won as a matter of *state law*, all that he originally sought." *Smith v. Cumberland School Comm.*, Nos. 81-1454 and 81-1499, slip. op. at 2 (January 11, 1982).

properly limits the fees provision of the more general Rehabilitation Act." *Smith v. Cumberland School Committee*, 703 F.2d at 10.

The plain meaning of the language of Section 505 simply does not support the Court of Appeals' conclusion. Section 505 authorizes fees in *any* action or proceeding to enforce Section 504. There is no indication in the statute or its legislative history that "any" action or proceeding means "any" litigation *except* that which might possibly be pursued in combination with the EAHCA. The intent of Congress as evidenced in the legislative history of Section 505, directly refutes the holding of the Court of Appeals:

> [D]isabled individuals are one of the very few minority groups in this country who have not been authorized by the Congress to seek attorneys' fees. The amendment proposes to correct this omission and thereby assist handicapped individuals in securing the legal protection guaranteed them under title V of the act.

H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7332. That statement, coming three years after the enactment of the EAHCA and a year after the promulgation of specific regulations under Section 504, makes it clear that Section 505 applies to *all* handicapped individuals whether or not they happen to have similar rights under another statute. However, the Court of Appeals would seem to be holding that the 1975 EAHCA implicitly repealed the 1978 passage of Section 505. Obviously, given the chronology of the various developments in this field, this could not be.[19]

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[19] Apart from the timing of the passage of the statutes in question, the Court of Appeals' decision that Section 505 was implicitly repealed by the EAHCA "would surely do violence to the 'cardinal rule . . . that repeals by implication are not favored.' *Morton v. Mancari*, 417 U.S. 535, 549, *quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)." *TVA v. Hill*, 437 U.S. 153, 189 (1978).

That the First Circuit misinterpreted the relationship between the EAHCA and Section 504 is further demonstrated by the 1978 amendments to Section 504. By 1978, there had been the promulgation of the HEW regulations which Congress had examined and codified, *see* S. Rep. No. 890, *supra*, and decisions holding that Section 504 guaranteed an appropriate education, *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634, and *Hairston v. Drosick*, 423 F. Supp. 180.

Preemption should not be lightly implied. What the Court of Appeals attempted to avoid in misconstruing the statute, is precisely what Congress sought to ensure —that certain programs (in this context, many elementary and secondary schools and other education programs) would be governed by the requirements of *both* the EAHCA and Section 504. *Helms v. McDaniel*, 657 F.2d 800, *rehearing denied*, 664 F.2d 291 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982), and *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

In this instance, the timing of events is of utmost importance. Congress passed Section 505 the year after the promulgation of the regulations under Section 504. Congress demonstrated its approval of the regulations by codifying them. *Jones v. MARTA*, 681 F.2d at 1382. As the court in *Patsel* observed:

> In some cases, then, Section 504 rights may be vindicated by obtaining compliance with EHA procedures even if the EHA is not applicable. . . . No indication has been found that the EHA alone must be applied to cases in which the EHA is applicable, i.e., that the two were mutually exclusive . . . close inspection of the attorneys' fees provision itself is in order. The plain language of Section 505 of the 1978 Amendment of the Rehabilitation Act allows the court to award fees '[i]n any action or proceeding to

> enforc or charge a violation of this subchapter.' 29 U.S.C. § 794a(b). It does not state that fees should not be awarded if the action or proceeding is one which happens to involve rights in addition to those secured by a provision of the Rehabilitation Act. In other words, Section 505 is not explicitly limited to actions which can be brought *only* under a Rehabilitation Act provision, such as Section 504, and no other, such as the EHA. The statute could have been so limited, if that were the intent, since both the EHA and Section 504 were already in existence, as were their coordinated and consistent regulations. It was not limited . . . In light of such express intent to aid *all* handicapped children seeking an appropriate placement this court cannot construe Section 505 as inapplicable merely because a parallel claim was successfully brought under the EHA.

Patsel v. D.C. Bd. of Educ., 530 F. Supp. at 665-666 (emphasis in the original).

In sum, there is nothing in Section 504, Section 505 or the EAHCA to suggest that Congress intended to limit the substantial rights provided in the first two by passing the latter.[20]

IV. CONGRESS SOUGHT TO ENSURE THE RIGHTS OF HANDICAPPED CHILDREN BY ESTABLISHING A SYSTEM OF FEE SHIFTING.

In passing the EAHCA and amending Section 504, Congress sought to ensure that handicapped children's

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[20] Many commentators have disgreed with the First Circuit's position that there was no basis for any fee award here. *E.g.*, Bodensteiner, *Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps*, 5 W. New Eng. L. Rev. 391 (1983) and Hyatt, *Litigating the Rights of Handicapped Children to An Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. Rev. 1 (1981). In addition, the Fifth Circuit has recently "reject[ed]" the First Circuit's reasoning at issue here. *Espino v. Besteiro*, 708 F.2d 1002, 1009 (5th Cir. 1983).

rights to special education would be protected.[21] Fee-shifting ensures that this may, in fact, happen.

"The availability of attorney fees can be a significant practical factor affecting whether aggrieved handicapped students are able to assert their education rights." C. Citron, *The Rights of Handicapped Students* 53 (1982). Section 504, as with other civil rights acts, "depend[s] heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976). By providing for fee awards in Section 505, Congress sought to promote the effective representation of handicapped persons alleging discrimination.

This goal matches the expectations of those most concerned with protection of these rights that "adequate legal representation for handicapped persons" is a necessity. The White House Conference on Handicapped Individuals, 2 *Final Report* 282 (1977). "Many legal cases are not filed in court because plaintiffs are poor or are enured to discriminating [sic] treatment. Many lawyers shy away from the litigation because the law is unclear, the legal standards are obscure, and the expense is great." Schroeder, *The Law Speaks—Disability and Le-*

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[21] Passage of the EAHCA and Section 504 has not completely rectified the problem. As of September, 1982, the Department of Education discovered that 22,610 "children identified as handicapped [were] receiving no education whatever. Another 31,976 are in some school programs but are not receiving special education services they have been identified as needing. Some 192,499 are awaiting evaluations." United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 28 n. 77 (1983). "These figures do not account for children school authorities have not yet identified as handicapped. Moreover, the numbers quoted are probably significantly underestimated; they are projected estimates based upon *self-reported* numbers supplied by school districts." *Id.* (emphasis in the original.)

similar results. A study of seventy-one hearing cases in *gal Practice* in *Disabled People as Second Class Citizens* 85 (M. Eisenberg, C. Griggins, and R. Duval eds. 1982).

The primary protection for handicapped children under Section 504 and the EAHCA is the due process hearing.[22] 20 U.S.C. § 1415 (1981), 34 C.F.R. § 104.36 (1982). As this Court has recognized in *Bd. of Ed. v. Rowley*, 458 U.S. at 205, "the importance Congress attached to these procedural safeguards cannot be gainsaid." However, for the due process system to function effectively, there must be a reason for the LEA's and SEA's to follow determinations rendered in the hearings. *See, e.g., Jacobsen v. District of Columbia Board of Education*, 564 F. Supp. 166 (D.D.C. 1983) (school district failed to obey determination that proposed placement was inappropriate and refused to maintain current placement), and *Patsel v. District of Columbia Board of Education*, 522 F. Supp. 535 (D.D.C. 1982) (school district refused to hold due process hearing on denial of change of placement). *See also, Hastings v. Maine-Endwell Central School District*, 676 F.2d 893. An effective method of ensuring that each individual receives his or her due process is to allow for attorney's fees in ensuing litigation. In this way, school districts will be more likely to obey the determinations of hearing officers and less likely to force parents and children to file suit to enforce determinations, thus protecting the children and conserving scarce judicial resources.

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[22] It should be noted that, for the 1979-80 school year, there were only 2,584 due process hearings in the United States. United States Department of Education, Special Education Programs, *Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* 45 (1982). Of this number, 1,166 were hearings conducted by local education agencies ("LEA") and 1,418 were conducted by state education agencies ("SEA"). *Id.* It is unclear exactly how many children were involved in these hearings. Eight of the states provide only for SEA level hearings. *Id.* at 41.

Experience in the District of Columbia has demonstrated that fee awards are typically at a level which balances their deterrent value against the need to allocate these limited resources for education. In a total of thirteen cases the highest fee award was $9638.00, the lowest, $1260.00, and the mean, $3940.[23]

Congress has determined that allowing fees to prevailing plaintiffs has a deterrent value since "it gives defendants strong incentives to avoid arguable civil rights violations and to make concessions in hopes of an early settlement." *Hensley v. Eckerhart*, 103 S.Ct. at 1944-45 n.2 (Brennan, J., concurring in part and dissenting

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[23] The cases in the District of Columbia and the amount of the awards are as follows:

Intrator v. District of Columbia Bd. of Educ., C.A. No. 82-1204 (July 19, 1982) $2746.80

Murray v. District of Columbia Bd. of Educ., C.A. No. 80-2645 (July 19, 1982) $3560.00

Foster v. District of Columbia Bd. of Educ., C.A. No. 82-095 (June 25, 1982) $2836.03

Capello v. District of Columbia Bd. of Educ., C.A. No. 79-1006, *on appeal*, U.S. App. No. 82-1702 (June 9, 1982) $8424.00

Means v. District of Columbia Bd. of Educ., C.A. No. 78-2402 (March 31, 1982) $9638.00

Johnson v. District of Columbia Bd. of Educ., C.A. No. 80-897, *on appeal*, U.S. App. No. 82-1209 (January 29, 1982) $3491.00

Fells v. District of Columbia Bd. of Educ., C.A. No. 81-821 (January 29, 1982) $1290.00

Small v. District of Columbia Bd. of Educ., C.A. No. 82-864 (January 29, 1982) $3650.05

Warren v. District of Columbia Bd. of Educ., C.A. No. 80-1841 (January 28, 1982) $4218.00

Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660 (January 21, 1982) $2860.00

Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1212 (January 21, 1982) $5921.00

Harris v. District of Columbia Bd. of Educ., C.A. No. 81-1842 (December 18, 1981) $2117.79

Fells v. Brooks, 522 F. Supp. 30 (March 9, 1981) $1260.00.

in part) (citations omitted). A possible award of attorney's fees has the salutory effect of providing "assurance that agents of the State will not deliberately ignore due process rights." *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978).[24] This is particularly true when Congress has determined that the rights of handicapped children need special protections. *See* 20 U.S.C. §§ 1400(b)(9) and (c) (1981) ("it is in the national interest that the Federal Government assist State and local efforts . . . to meet the educational needs of handicapped children in order to assure equal protection" and "[i]t is the purpose of this chapter to assure that all handicapped children have available to them . . . a free appropriate education.")

Not only did Congress allow for fees as one way of promoting the involvement of lawyers in protecting the rights of handicapped children, but in addition, allowing fees in a sense "evens the odds." "Parents and advocacy groups have complained that the school or agency has an unfair advantage in the hearing process. The area of legal counsel is one such area upon which complaints are based. Simply stated, the parents feel their tax dollars are actually supporting competent counsel for the other party." P. Jones, *A Practical Guide to Federal Special Education Law* 94 (1981).[25] Congress sought in the

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[24] While the EAHCA, 20 U.S.C. § 1416(a) (1981), and Section 504, 34 C.F.R. § 104.61 (1982), have provisions allowing the Department to withhold funds to LEA's and SEA's that violate these Acts, that sanction works to the detriment of handicapped children by denying all an education. Thus, the magnitude of the sanction undercuts its effectiveness.

[25] As Budoff and Orenstein found, many parents need support to cope with the traumas associated with the due process procedures and attendant litigation. "It's really very rough and frustrating, and you feel like an idiot at times." "It's been hell. Absolute hell. I very seldom speak about it, even to my husband, because I find that it gets me very upset. And once I start thinking about it, I get the feeling that I become very obcessed [sic] by it and that's all I

grant of fees to reduce the schools' and agencies' "overall advantage." *Id.* at 95.

Providing fees will protect the child's right to litigate, but will also encourage the due process system to function more effectively. This system was designed by Congress and the Department to resolve disputes quickly and without litigation. *Bd. of Educ. v. Rowley*, 458 U.S. at 206. Involvement of counsel will help accomplish this.

Recent research has demonstrated that the efficiency of the process increases with involvement of attorneys. In Pennsylvania, children and their families who were represented by counsel were found to have a much greater chance of success in due process hearings and, consequently, vindicating the rights this system of laws was designed to protect. The earliest empirical evidence of this difference in result was discovered in research on the implementation of the *PARC* decree. "Parents represented by counsel were significantly more likely to win a favorable ruling." Kirp, Buss, and Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 Cal. L. Rev. 40, 78 (1974). Research on the implementation of Chapter 766 in Massachusetts, Mass. Gen. Laws Ann. ch. 71B (West 1981), (a state statute used as one of the models for the due process procedures in the EAHCA and Section 504), shows

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can think about. My husband spent hours and hours with the papers, stacks and stacks of papers, for nearly two years." M. Budoff and A. Orenstein, *Due Process in Special Education* 115 (1982) "As might be expected from their description of hearings, many parents felt they were 'beaten' by an adept attorney for the school. 'The only time they do rule for the children is when it's a very obvious case of negligence . . . . It seems that those are the only ones who win, unless you have a lawyer.'" *Id.* at 136. "The involvement of lawyers in special education hearings is increasing, and this is probably both useful and inevitable." "Most parents probably require some sort of representation to help them organize their materials into a coherent and reasoned presentation." *Id.* at 234.

Massachusetts discovered that parents' representation by counsel was the factor which most influenced the outcome of the hearing. M. Budoff and A. Orenstein, *Due Process in Special Education* 229 (1982).[26]

In this instance, the First Circuit's denial of attorney's fees defeats two congressional priorities: the mainstreaming of handicapped children into American society expressed in Section 504 and the EAHCA, and the private enforcement of civil rights statutes expressed in §§ 1988 and 505. (42 U.S.C. § 1988 (Supp. V 1980). While the First Circuit's decision has been shown to be against the weight of authority, more importantly, if allowed to stand, it effectively denies handicapped children their only protection in the area which is most fundamental to them—education.

Therefore, *amicus* ACLD urges that this Court reverse the First Circuit's decision and award attorney's fees for this litigation.

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[26] A study of California state appeal hearings shows similar results. When the parent was represented, the family "won" eighteen and "lost" seven; without counsel the family "won" eight and "lost" ten. M. Kirst and K. Bertken, *Due Process Hearings in Special Education: Some Early Findings from California* in *Special Education Policies* 167 n.33 (J. Chambers and W. Hartman eds. 1983). While the data are less than complete, the trend seems clear. The presence of counsel at the due process hearing significantly aids the protection of the handicapped child's rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals and award attorney's fees to petitioners.

Respectfully submitted,

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